



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

The Receding Tape

Citation for published version:

Walker, N, *The Receding Tape*, 2013, Web publication/site, Scottish Constitutional Futures Forum.
<<http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2236/Neil-Walker-The-Receding-Tape.aspx>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

© Walker, N. (Author). (2013). The Receding Tape. Scottish Constitutional Futures Forum.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.





WWW.SCOTTISHCONSTITUTIONALFUTURES.ORG

HOME ABOUT THE SCFF OPINION AND ANALYSIS EVENTS NEWS RESOURCES CONTACT US

SCFF Blog

[<< Return to blog](#)

[Subscribe to our news feed](#)

Neil Walker: The Receding Tape

Posted on September 18 2013

And so the countdown begins. But the countdown to what? Twelve months from now we should know the result of the referendum, but just how significant a marker will that be on Scotland's constitutional journey?

One popular view - for many less a reasoned view than a deep-rooted assumption - maintains that the referendum will be decisive and conclusive of Scotland's future constitutional shape and status. The contemporary history of the Scottish national debate began with Winnie Ewing's by-election success in Hamilton in 1967, continued through the abortive devolution referendum of 1979, and reached a new pitch with the successful plebiscite of 1998 and the election of the new Scottish Parliament in 1999. According to the conventional narrative, this long Scottish constitutional 'moment' is now drawing to an end, the independence referendum scheduled for September 2014 its final act. And despite some early mutterings from the side-lines about the inclusion of a third 'devo-max' option on the ballot paper, that final act will consist of a straight choice between 'yes' or 'no', 'out' or 'in'.

But why should we conclude that the availability of a straight choice to stay or leave - the first such choice offered the Scottish people in over three centuries of Union, will settle matters once and for all? There are at least three arguments supporting this position. The first has to do with the vagaries of constitutional history. As we were reminded by the Political Studies Association's recent decision to honour Cameron and Salmond in recognition of the two Ministers' diplomatic achievement in signing the Edinburgh Agreement, the referendum was hard won. It took 40 years of political momentum-building, the platform and profile of the Scottish Parliament, some unlikely and unanticipated electoral arithmetic at the 2011 Scottish elections, the flexibility of Britain's unwritten constitution, a gradual yet unprecedented groundswell of democratic opinion in favour of exercising the national 'right to decide', and a strategic calculation on both political sides that there would be no obviously better time in the foreseeable future to hold a ballot, to bring us to the point where a constitutionally unimpeachable referendum could be delivered. With the clock now ticking down it is easy and tempting to think that there is something natural and inevitable about this final act, but the combination of circumstances that has brought us to this point is actually highly contingent, and unlikely to be repeated any time soon.

The second reason why the referendum is widely viewed as a cue for closure has to do with political culture. It is almost inconceivable that a 'yes' vote would be reversed, but a clear 'no' vote, too, would likely blight the prospects of a re-run for a generation or longer. Arguably ever since Winnie Ewing 'reconvened' the Scottish Parliament in 1999, and certainly since the first minority SNP administration of 2007, Scottish politics has been in a state of high constitutional alert. The referendum itself has provided an all-consuming focus since early 2012, with every political act and deed from then until now, and doubtless from now on until our date with destiny next year, carefully weighed and dissected for its constitutional content or implications. If, as is undoubtedly true, there are already signs of constitutional fatigue in the political parties, in the media, in civil society and on the streets a year ahead of the vote, then we can only imagine how things will feel after another 365 days of increasingly intense engagement and polarised debate. More generally, 2014 feels like the end of a political era. A generation of Scottish politicians who cut their teeth on the devolution battles of the 1970s and who were fully formed by the class and nation-polarising politics of the Thatcher years now supply many of the senior players in the referendum drama. For them, this is undoubtedly the endgame. It is the destination towards which their political career has long been heading. Whatever the result next year, it will be the last time many of the key actors will muster for constitutional battle.

A third reason for believing we are headed towards a constitutional denouement next year is a basic one of principle. Even in an unwritten constitution like ours, constitutional decisions are 'second-order' political decisions. That is to say, they are decisions about how to take other decisions. They decide 'who' should decide 'what' and 'how'. They provide the foundations without which 'first-order' programme politics on matters such as the economy, jobs, welfare, the environment and defence are not possible and without which our everyday legal rules and institutions are not viable. Like all foundations, they require to be reasonably secure. They have to be seen to be legitimate, as broadly accepted and as beyond challenge except in special circumstances and in accordance with occasional and extraordinary procedures of contestation over the basic terms of political life. As such an extraordinary procedure, the referendum cannot be allowed to become a 'neverendum', everyone is agreed. It has to be a 'once in a lifetime' or a 'once in a generation' event - to quote the public pronouncements of the Scottish Secretary and the First Minister respectively to mark today's pre-anniversary - not just because the opportunity might not arise again, and not only because of the exhaustion of a political culture, but also because normal political life might otherwise become unsustainable.

These arguments have much to commend them. And as the comments of the Scottish Secretary and the First Minister suggest, they have been taken on board by both sides. No doubt, moreover, these views will be expressed with ever greater stridency in the months ahead, as

both Better Together and Yes Scotland seek to impress upon us the historical seriousness of what is at stake in the referendum and the importance of voting the right way. No doubt, too, once the nationalists publish their White Paper later this autumn setting out in detail what they understand the terms of independence to be, this clarity of principle will begin to be matched by a more transparent sense of the detailed implications. Independence will cease to be an abstract and free-floating idea. It will instead begin to look like a substantive blueprint. And this will serve to reinforce a sense of the debate as a binary choice, with all outstanding questions on matter such as monetary union, EU membership, NATO membership and welfare citizenship either folded into the binary choice or postponed to another day. In other words, as the event draws nearer the 'politics of the event' will inevitably take over. The event will be nothing if not *eventful*, and its anticipation will bring with it its own powerful sense of dramatic closure.

Yet there is another side to this story, one that receives less attention but which demands some modification of the above picture. In the first place, we simply cannot assume that the decisive referendum will produce a decisive result. Most polls suggest a lead of 10-15% for Better Together, with around one in five still undecided. Not only does that leave the final outcome uncertain, it also raises the very real prospect of a close result, or at least one in which the losing side polls more than 35-40% of the vote. In these circumstances, the defeated side is not simply going to go away and lick its wounds. Instead, we should expect two things. First, alongside the main win-lose campaign, over the next year there will be shadow, spin-doctored campaign over the significance of defeat. At least some nationalists, not to mention the two out of five voters in the recent ICM poll who say they would vote No but would like the Scottish Parliament to become primarily responsible for taxation and welfare benefits in Scotland, will seek to interpret a narrow or respectable defeat as a mandate to insist that the Unionist parties come good on their promise to take further devolution seriously. Inevitably, this will open up new battle lines over how much further devolution is enough, over what constitutional process is required to deliver this, and over what constitutional options remain in the wings in the event of failure to build a winning consensus around the new proposal.

Equally, however, a narrow Yes vote would leave all sorts of constitutional questions unresolved. Much has been made of the tight timetable for constitutional changeover envisaged by the Scottish Government in their White Paper on *Scotland's Future*. The plan is to have an early post-vote set of agreements in place between Edinburgh and London with a view, first, to providing Edinburgh with a 'constitutional platform' to act with much of the authority of an independent state in the transitional period and, secondly, to securing a final timetable for the negotiation and conclusion other agreements that will form part of a final independence settlement as early as March 2016. Outstanding questions for that final settlement will include the division of financial and other assets and liabilities such as military bases and overseas assets, the transfer to Edinburgh of political authority over institutions previously controlled from London, and the content of the cooperative arrangements that the peoples of Scotland, England, Wales and Northern Ireland would continue to share - presumably from matters as mundane as the issue of driving licenses to those as consequential as currency union and the future of a common welfare system. At the same time, Edinburgh would be in negotiation with the European Union and many other international organisations over the terms of new or continuing membership, all the time bearing in mind that the Scottish government should be careful not to over-commit itself since, under its own commitment, the mature constitutional form and purpose of the new Scotland should await the deliberations of a post-independence constitutional convention. Obviously, there is much scope in such a complex and ambitious timetable for the UK government of whatever political colour, complete with a fresh general election mandate in 2015, to be more or less obstructive or co-operative, more or less generous in its understanding of how it must deliver the terms and consequences of Scottish independence. And undoubtedly, its attitude would in some measure be influenced by the outcome of the referendum vote and the strength of the mandate for independence delivered.

My purpose in outlining these possibilities, however, is not simply to indicate that everything will not be done and dusted next September, but to point to a wider sense of constitutional open-endedness. Today, in a nutshell, we live in a world where independence is not what it used to be. While the state remains the focus of political organisation, it is now merely first among equals. In place of a universal and uniform template of sovereign statehood, we have a highly differentiated mosaic of legal and political capacities. In place of an idea of internal sovereignty as comprehensive and monopolistic, authority is now typically partial and distributed amongst various political sites and levels - state, sub-state, regional and global. And in place of mutual exclusivity as the default condition of external sovereignty, we have overlap, interlock and mutual interference and dependence. This picture of complex interdependence is perhaps nowhere more vivid than in Europe. The prospect of Scottish independence, like the reality of UK independence, has to be viewed against a backdrop of the existence of the EU as a supranational economic polity of 28 states, the broader current of the Council of Europe as a standard bearer in human rights, the growing influence of the United Nations in peace and security, powerful global regimes in areas as diverse as climate change, nuclear non-proliferation and international trade, and a strong constitutional tradition of federalism and quasi-federalism in states as diverse as Spain, Belgium, Germany and, of course, the United Kingdom itself.

Many of the uncertainties which will attend the implementation of the referendum decision, and, indeed, that are affecting the very terms on which independence is sought and fought over during the campaign, arise precisely from this set of factors. EU membership is clearly one, with the continuing uncertainty over Scotland's pathway to membership, but also over whether a Conservative-led Britain would stay in, and if so on what terms. The nature of a Scottish currency is another, whether part of a common area with sterling or resituated inside the Eurozone. Defence, is another still, with membership of NATO and the retention of a nuclear capacity a key fault-line of debate. Internal security, too, is an area where public goods are increasingly transnationally located; hence the controversy over an independent Scotland's relationship to the Area of Freedom, Security and Justice in the EU and to the Schengen zone. In these and many other areas, the choice is not between freedom and dependence, but a complex algorithm involving a multi-level trade-off between autonomy of voice in smaller units and the pooling of influence in larger units. What is more, these sorts of instrumental considerations are also reflected at the level of identity politics. When commentators say that the Scottish independence debate will not be won or lost at the level of cultural identification they speak a fundamental truth. The majority of us have mixed identities - a fact that the nationalists do well to respect with their endorsement of 'Englishness' and 'Britishness' as cultural categories with which they wish to engage. This both reflects and reinforces a sense that our constitutional and political status is not written indelibly on the cultural landscape but is highly and variably influenced at the margins by more concrete questions of costs and benefits.

All of this speaks, in the longer term, to a more fluid picture. However hard the race is run over the next year, and however concentrated the runners remain on the finishing line, all will not be won or lost on September 18th 2014, or indeed in the months and years immediately following that. If we try to stand back from the fray, we see instead a longer struggle, and a constantly receding finishing tape. For in a multi-part Europe and complexly interdependent world, the balance of interest and identities is such that it is difficult to

conceive of any long-term scenario in which the various parts of the mosaic co-articulate in a settled matter.

This is *not* to say that our referendum is anything other than the political event of its generation. It is that event, and it should be treated as such. And the necessary virtue of constitutional foundations does, I repeat, demand as much security of our second-order rules as we can manage to achieve and to sustain. Yet we should not mistake any of this for constitutional finality. The lesson of the post-war globalizing world is that constitutional events are rarely conclusive and never self-contained, but feed into an on-going process of complex multi-sourced influence. And this is never more true than when we are concerned with the constitutional politics of sub-state identity, as the local example (still strangely neglected in many referendum discussions) of Britain and Ireland so vividly illustrates. The one thing we can be certain about when we have finished counting the votes a year from now, therefore, is that the constitutional future will still look far from certain.

Neil Walker is Regius Professor of Public Law and the Law of Nations at the University of Edinburgh

Actions: [Comments \(1\)](#)

Comments

Anonymous
23 September 2013 08:17
.....
<http://blogs.sps.ed.ac.uk/referendum/the-receding-tape/>

Post Comment

Only registered users may post comments.